

# Third Party Appointment: Power of Attorney and Guardianship

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# Background

# What we are not

- ▶ “I Care A Lot”
  - ▶ Netflix
- ▶ Brittny Spears and Amanda Bynes
  - ▶ Texas vs. California

# Definitions

- ▶ Power of Attorneys (POA):
  - ▶ A durable power of attorney is one that either takes effect upon or lasts after the principal's incapacitation. This is different from a general power of attorney, which takes effect upon the principal's permission.
  - ▶ According to Section 751.00201 of the Texas Estates Code, a person is considered to be "incapacitated" for the purposes of a durable power of attorney if a doctor's examination finds that they are not able to manage their own finances. The doctor must provide a written statement certifying this finding of incapacity.

# Definitions

- ▶ Two Types: Financial and Medical
  - ▶ A financial durable power of attorney - this means that it only allows the agent to handle financial matters. It does not permit the agent to make decisions about the principal's health care.
    - ▶ Effective immediately or upon declaration of incapacitation by medical doctor
      - ▶ Up to principal
  - ▶ A medical power of attorney allows an individual to designate an agent to consent to medical treatment. See Tex. Health & Safety Code § 166.151. This power of attorney can be either notarized or witnessed by two qualified witnesses. Tex. Health & Safety Code § 166.154.
    - ▶ Effective upon declaration of incapacitation by medical doctor.

# Definitions

- ▶ The medical and financial power of attorneys can be revoked—
  - ▶ 1. by oral or written notification by the principal to the agent or health-care provider “or by any other act evidencing a specific intent to revoke the power,” without regard to the principal’s capacity;
  - ▶ 2. by the execution of a subsequent power of attorney; or
  - ▶ 3. if the agent is a spouse and the marriage to the principal is dissolved, annulled, or declared void, unless the power provides otherwise. Tex. Health & Safety Code § 166.155.

# Definitions

- ▶ Guardianships:
  - ▶ The court may appoint a guardian for an incapacitated person if it has clear and convincing proof that the person is incapacitated, that it is in the best interests of the proposed ward to have a guardian appointed, that the rights or property of the proposed ward will be protected by the appointment, and that alternatives to guardianship and supports and services available to the proposed ward that would avoid the need of a guardianship have been considered and are not feasible. Tex. Est. Code § 1101.101(a)(1).

# Definitions

- ▶ The guardian's ability to act in most circumstances will be dependent on orders of the court. Tex. Est. Code §§ 1151.102, 1151.103.
- ▶ The court will appoint a guardian with either full or limited authority over an incapacitated person as indicated by that person's actual mental or physical limitations and only as necessary to protect and promote the well-being of the person. Tex. Est. Code § 1001.001. The guardianship may be of the person, the estate, or both Tex. Est. Code § 1101.151(a).

# POA's (Proactive) Versus Guardianship (Reactive)

- ▶ Medical Power of Attorney versus Guardian of the Person
  - ▶ Medical consents, residence, care plans...
  
- ▶ Durable Power of Attorney versus Guardian of the Estate
  - ▶ Investments, bill pay, accounts, property management...

# Financial Planner's Role

- ▶ Trusted Advisor
  - ▶ Prepare sound financial plans to **ensure clients meet their goals**
  - ▶ Advise clients on current financial issues and **make recommendations**
  - ▶ Generate new business and **build relationships**
    - ▶ Building a trusted advisor relationship necessitates time, meetings and, generally, a long term plan where the financial planner gets to know their client.
    - ▶ The client, during planning sessions, will naturally entrust family background and life details to the financial planner.
    - ▶ The financial planner can observe and review the client's condition as part of ensuring client meets their goals.

# Build Relationships, Ensure Goals, Make Recommendations

- ▶ As the financial planner builds relationships with their clients, they can observe physical or mental declines. As part of ensuring clients meet their goals, it may be necessary for a financial planner to make recommendations.
  - ▶ Common signs for Financial Planners to look for:
    - ▶ Physical
      - ▶ No one to rely on, may ask for assistance, falls, hospitalizations, overwhelmed, long absences.
    - ▶ Mental
      - ▶ Not paying bills, discrepancies, anomalies, poor decision making, fraud, lack of time/space, memory

# Build Relationships, Ensure Goals, Make Recommendations

- ▶ Clients may look for assistance with personal care, medical care or financial needs if physical decline reaches point of major difficulty.
  - ▶ Personal care may be finding residential placement like home care, independent or assisted living.
  - ▶ Medical care may be specialist referral help, Medicaid/Medicare or insurance applications, in home care services, rehabilitation services and other needed paths.
  - ▶ Financial needs may be estate management, bill pay and investment coordination.
- ▶ Financial planner may detect mental decline if client's account shows discrepancies, anomalies, poor decision making or fraud.

# What can a Financial Planner do?

- ▶ Depending on client's condition:
  - ▶ POA's (Proactive) and Guardianships(Reactive)
  - ▶ Family Attorney
  - ▶ Family Doctor
  - ▶ Facility or senior living recommendation
  - ▶ Adult Protective Services
  - ▶ Court form

# Case Study #1

- ▶ A 76 year old male, John Smith, has a large estate, including large investment account started with his wife. His wife began having medical issues and received in home care. In June, his wife passes away from medical issues. In the same month, wife's caretaker/hospice nurse moves in with Mr. Smith. Mr. Smith, along with caretaker, goes to investment firm to take out large sum. Mr. Smith's bank accounts are also drained. In November, Mr. Smith marries his wife's caretaker. Mr. Smith appoints newly married caretaker his power of attorney and deeds her his house. Over the phone, Mr. Smith asks the investment firm to close his account. Financial planner states this would have to be done in person. Financial planner speaks to him about why he is closing as the account has been built up over many years. After hearing details, financial planner flags the account and alerts APS for possible exploitation. APS files a report with the county court who appoints an emergency temporary guardian. The guardian restricts all accounts through court order. Guardian was able to place Mr. Smith in an assisted living. Mr. Smith is diagnosed with dementia and declared incapacitated. Caretaker is arrested and charged with elder abuse and financial exploitation. She was sentenced to twenty years.

# Case Study #2

- ▶ A married couple live in Texas. They own a home, several bank accounts, retirement accounts, and an investment account. They have no children and their nearest family live in Illinois. They are in their 90s. The husband has had a stroke. The wife has dementia. Both are deemed competent by their physician. Their attorney reached out for third party POAs. They each signed a MPOA and DPOA. The MPOA will become active upon either being declared incapacitated. The DPOA became effective immediately. Third party was able to place the couple in a 24-hour care facility, sell their home, bill pay, taxes and expand their investments to pay for care.

# Case Study #3

- ▶ A Japanese- American lives in Texas. She is in her 60s. Her husband has passed away. She has no children. She has large bank accounts, rental properties, and investment account. Her extended family lives in Japan. She is worried on what will happen to her and her property if something should happen. She is older. She could have health problems. She could have an accident. She states you don't know what could happen in future. Her attorney set up a face-to-face meeting. The attorney drafted springing POAs assigning a third-party as agent if a medical professional were to declare her incapacitated.

# Case Study #4

- ▶ Widowed Woman passes away with no children. She has no will. The Court signs order to distribute her estate to surviving siblings. Part of estate is investment account. One sibling is diagnosed with an intellectual disability. Investment manager is requiring a guardianship of the estate before proceeding with distribution. Due to familial circumstances, siblings are unwilling to be appointed.

# Refresher

- ▶ A Financial Planner may see signs necessitating a conversation with client on the applicability of a POA or a guardianship.
  - ▶ There are some indications that a person may need a guardian.
    - ▶ Does the person have problems in more than one of the following areas:
      - ▶ language and communication
      - ▶ nutrition - personal hygiene health care
      - ▶ personal safety, employment, independent living or financial matters

# Refresher

- ▶ There are some clients who, through circumstances, are by themselves.
  - ▶ Widowed or never married
  - ▶ No children or are estranged from family
  - ▶ Live by themselves
  - ▶ Family may live out of state or out of country
  - ▶ Family members may be deceased.

# How would Financial Planners recommend POA's and Guardianships?

- ▶ POA's
  - ▶ Clients may fill out, sign and notarize a medical and/or financial power of attorney upon advice or through an attorney's supervision.
    - ▶ It must be notarized or signed in front of two competent witnesses.
    - ▶ To be noted, an FPOA generally appoints an agent to handle all financial decisions. However, the client may initial next to specific financials they would like an agent to possess. Unless otherwise directed, the FPOA begins immediately upon signature.
    - ▶ The agent may receive reasonable compensation.
- ▶ Blank FPOA and MPOA Forms provided on Texas State Website

# How would Financial Planners recommend POA's and Guardianships?

## ▶ Guardianships

- ▶ An interested party (family, financial planner, concerned party) may contact Dallas County Court to initiate an investigation by the court into potential need for guardianship. [Probate Court | Guardianship \(dallascounty.org\)](#)
- ▶ Financial planner may contact Adult Protective Services detailing concerns and APS may bring guardianship proceedings if necessary.
- ▶ Client may visit their primary care physician to have an examination (Certificate of Medical Examination) to determine whether a guardianship is necessary or not
  - ▶ [CME\\_10092015.pdf \(dallascounty.org\)](#)
    - ▶ An attorney may initiate guardianship proceedings based on doctor's recommendations.

# How 3<sup>rd</sup> party may help Financial Planners

- ▶ Financial Planners, in their advisor relationship, will know client's family or relational circumstances. Then, as the physical or mental conditions worsen, this will provide opportunities to recommend POA's and Guardianships. There are 3<sup>rd</sup> parties who can fulfill their roles as family or friends cannot.
- ▶ Obviously, this is a big decision and would necessitate a client entrusting a 3<sup>rd</sup> party with authority.
  - ▶ Set up meetings
  - ▶ Follow – Up
  - ▶ Explanation of Qualifications and Experience
  - ▶ Building Trust

# Possible Qualifications for 3<sup>rd</sup> Party

- ▶ Attorney – Guardianships and POAs require legal documents
- ▶ Guardianship – State Certification – JBCC
- ▶ Court Oversight – Audits - Reports
- ▶ Multiple Employees to provide complete care
- ▶ Record Keeping – Care Plan and Management Plans
- ▶ Guardianships Standards transferable to POAs

# POA vs. Guardianship standards

- ▶ What to expect if put in place:
  - ▶ POAs – Little Regulation
    - ▶ Agent is stepping into the shoes of client.
      - ▶ Substituted judgement
        - ▶ What are their stated preferences and wishes?
        - ▶ Agent has been picked by client while cognitive
        - ▶ Account listing may change to reflect POA in place
        - ▶ “reasonable compensation” based on common rate of agent qualification

# POA vs. Guardianship standards

- ▶ Guardianship – High regulation
  - ▶ Restricted investment account – Management plan filed with Court for approval
  - ▶ Guardianship registration
  - ▶ Court approved monthly allowance
  - ▶ Monthly face to face visit – care folder
  - ▶ File annual report and accountings
  - ▶ File inventories
  - ▶ Don't commingle funds or borrow funds.
  - ▶ Substituted Judgement vs. Best Interest
    - ▶ Due to physical or mental deuteriation, Guardian is weighing stated preference to best interest.
  - ▶ Compensation
    - ▶ Time vs. income percentage

# Questions and Discussion

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